SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

NOV 5 1974
MICHAEL RODAK, JR., CLERK

October Term, 1974

No. 74-540

FRED STEVE MENDRIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH DISTRICT, AND THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

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October Term, 1974

No

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH DISTRICT, AND THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fourth District, affirming a state trial court's judgment of conviction of petitioner, and the denial of a hearing thereon by the Supreme Court of the State of California, sitting in bank.

OPINION BELOW

The opinion of the Court of Appeal, not yet reported, is Appendix "A" hereof. The Supreme Court of California denied hearing without opinion or comment The order so denying is Appendix "B" hereof

JURISDICTION

The decision of the Court of Appeal was filed May 10, 1974. A timely petition for hearing was filed with the California Supreme Court, the highest state court in which decision could be had; that court's order refusing to review the decision of the Court of Appeal was filed August 7, 1974. This Court's jurisdiction is invoked under Title 28, Section 1257(3), United States Code, and in conformity with Rule 22-1, Part V, Revised Rules of the Supreme Court, adopted June 15, 1970, effective July 1, 1970

QUESTIONS PRESENTED

There are seven compelling questions presented by the facts of this case. They are as follows:

1. Whether or not the shackling of petitioner Mendrin at trial, without a prior hearing to determine the necessity therefor, denied the petitioner a fair trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

2 Whether or not the decree of the trial court limiting the rights of the free press to report the occurrences at trial

denied petitioner Mendrin a fair trial, in violation of the First, Sixth, and Fourteenth Amendments to the United States Constitution.

3 Whether or not the unresponsive hearsay statement of witness Dobreaff, which the jury was admonished to disregard, was so damaging as to deny petitioner Mendrin a fair trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution

4. Whether or not the trial court's admission of evidence regarding the petitioner's alleged association with a prison inmate organization was in violation of the First and Fourteenth Amendments of the United States Constitution.

5. Whether or not the court's refusal to allow petitioner Mendrin access to evidence, which was utilized by the state to weave circumstantial evidence of a conspiracy of guilt by association with an inmate organization involving petitioner Mendrin, which evidence may also have provided evidence of a conspiracy of association by prosecution witnesses, denied petitioner a fair trial, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

6. Whether or not the court's failure to exclude evidence of previous attempted acts of violence upon the victim Castillo, while at the same time denying petitioner's offering of similar attempted acts of violence by others, denied petitioner Mendrin a fair trial, in violation of the Sixth and Fourteenth Amendments of the United States Constitution

7. Whether the totality of all the circumstances in the foregoing questions, and supporting facts, when taken as a

whole, denied petitioner Mendrin a fair trial, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provisions

The First Amendment to the United States Constitution, which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Sixth Amendment to the United States Constitution, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws "

Statutes (California)

Section 187(a) of the California Penal Code, which provides:

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought "

Section 189 of the California Penal Code, which provides:

"All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree "

STATEMENT OF THE CASE

A. Preliminary Statement

On April 21, 1972, Fred Charles Castillo, an inmate at the California Institute for Men at Chino, was murdered

Petitioner and his co-defendant, Donald Raymond Hale, were charged with the crime of murder in the first degree (California Penal Code Sections 187 and 189) Petitioner pled not guilty on June 8, 1972 On November 29, 1972, the jury returned its verdict, finding petitioner Mendrin guilty of murder in the first degree On December 15, 1972, petitioner was sentenced to the state prison for the term prescribed by law

B. The Shackling of Petitioner Mendrin

At trial, over the objections of counsel for petitioner Mendrin, petitioner was required to wear leg irons, which the court suggested, " If a modesty panel were to be placed in front of the counsel table there would be no prejudice to the defendants if they wore leg irons . "

The Court of Appeal addressed the issue of any prejudice that might have been created by the jury's observation of the shackles on petitioner Mendrin by noting that the jurors would not see the leg irons because of a "modesty panel" which the trial court ordered to be placed before the defense table (Appendix "A" pp 8 - 9) The "modesty panel" was evidently less than effective because, at oral argument in the Court of Appeal, counsel for petitioner Mendrin cited a newspaper story which quoted the jury foreman after the trial, and

which revealed that the jurors not only saw the shackles but that they had joked about them during the trial.

C. The Order Restricting the Press

The trial court, during the course of the trial, issued a "gag order" prohibiting the printing or disclosure by the news media of the true names or of photographs of any inmates who were called as witnesses by the prosecution. This had a negative impact upon petitioner's ability to successfully defend himself at trial, in that the gag order effectively denied publicity which might reasonably have led to the discovery of evidence reflecting upon the credibility of the prosecution witnesses.

The trial record indicates that news media representatives stood ready to report the events at trial and entered into the lengthy debate with counsel and the court, in which the court discussed in detail its rationale in issuing the order –so that witnesses from the prison community would not be as apt to be identified by their fellow prisoners and subjected to possible reprisals by friends of the defendants. The court inadvertently recognized the validity of the principle of law urged by petitioner in paragraphs 5 and 6 of "Questions Presented" above. This discussion included the details of prior reprisals in the California prison system and atrocities reputedly resulting therefrom. The bulk of this discussion, as well as the lengthy comments by the court, took place in front of the impanelled jury, and its incriminating implications are obvious.

The further impact of the order was, of course, to obtain the testimony of the prison population most favorable to the

state. The order was not supported by either the affidavits or testimony of potential witnesses who would refuse to testify absent such an order, and the transcript reveals that the state knew of no potential witnesses who would refuse to testify absent such an order.

D. The Unresponsive Hearsay Statement of the Witness Dobreaff

Mr. Paul Dobreaff, a prison employee, volunteered testimony of a hearsay statement made by the decedent to the effect that he (the decedent) knew that there was "a contract" out on him. The statement was not made in response to any question asked, and the magnitude of the statement can only be appreciated when viewed in the context of witness Dobreaff's prior testimony.

Mr. Dobreaff was, presumably, an expert of sorts in the goings-on and structure of the California prison system's subculture. Two of the more active groups in this subculture are the American Nazi Party and the Aryan Brotherhood. Their goals are apparently not dissimilar, in that they both advocate a Hitler-type philosophy. There was voluminous testimony upon the existence and characteristics of both of these groups in the course of the trial. Petitioner Mendrin was associated with the Aryan Brotherhood group by Mr Dobreaff's testimony.

Victim Castillo was described by witness Dobreaff as being regarded by these groups as "a rat," or one who had revealed the activities of one or more of their members to prison authorities, and hence, according to what Castillo had told Dobreaff, the two groups had "issued a contract" on

Castillo, or, in other words, had directed his killing. This unsolicited, unresponsive hearsay statement regarding the "contract" was, of course, subsequent to Dobreaff's testimony as to the existence of the Aryan Brotherhood and the association of petitioner Mendrin therewith. This statement served to connect the then-as-yet unconnected chain of guilt by innuendo and association, and, to that extent, was extremely damaging to petitioner Mendrin's defense, regardless of the court's instruction to the jury to disregard witness Dobreaff's statement.

E. **Other Improper Testimony**

Witness Paul Dobreaff was allowed to testify, over petitioner's objection, regarding the alleged association of petitioner Mendrin with a prison group known as the Aryan Brotherhood. Additionally, Dobreaff testified regarding prior acts of violence committed upon the victim Castillo, allegedly by the Aryan Brotherhood. These prior acts, according to the witness, occurred at California prison institutions other than the Chino facility where the victim met death.

Over the strenuous objection of petitioner, the court allowed inmate Pettijohn to testify that he witnessed an attempted stabbing of decedent Castillo at Folsom State Prison in 1968 and again at Vacaville Prison in 1969. The intensely prejudicial nature of this testimony to petitioner is obvious when it is borne in mind that petitioner was first incarcerated in a different prison from the ones in which the prior alleged attacks occurred. Furthermore, the petitioner was not incarcerated until 1970–*after* the alleged attacks–and could have had nothing whatever to do with those prior attempts

on decedent's life

F. Prosecution's Evidence Establishing Guilt by Association

The primary source of witness Dobreaff's information regarding the Aryan Brotherhood, petitioner Mendrin's alleged association therein, and the prior acts of violence committed upon the victim Castillo, was the records of the California prison system.

The prosecution sought to prove that the successful stabbing of the decedent at Chino was the third attempt by the Aryan Brotherhood to take the victim's life. Assuming, *arguendo,* that the Aryan Brotherhood was responsible for the killing, no evidence was offered to show that petitioner was a member of that organization, except the highly improper and conjectural opinion testimony of Mr Dobreaff.

The state prosecutor, over the strenuous objections of petitioner, was allowed to induce evidence of prior acts of violence committed upon the victim Castillo by the Aryan Brotherhood Circumstantial hearsay evidence was offered before the jury, which was instructed by the court to disregard that testimony because of its hearsay character, that petitioner Mendrin was a member of the Aryan Brotherhood.

The innuendo of guilt by association, when coupled with Dobreaff's hearsay statement which is discussed in "D" *supra,* is clear Petitioner Mendrin objected to the line of questioning, as the intent of the prosecution became clear Despite the prosecution's protestations on the record that it was not seeking to prove guilt by association, the admission of this evidence had precisely that effect, and petitioner

Mendrin so objected on that ground

The Court of Appeal rejected petitioner's contention as to this evidence. It makes the curious statement, with respect to the witness Dobreaff's testimony, that he "was only permitted to relate what he knew" (Appendix "A" p. 15). In truth, his testimony consists of opinions, speculations, and general conclusions, rather than fact. The Court of Appeal attempted to explain away the fact that petitioner was not even incarcerated when the purported Folsom attempt on decedent's life occurred by stating that "as members of organizations engaged in violence, [defendants] could be expected to participate in violence because of their memberships in such organizations, regardless of who the target was" (Appendix "A" p. 15). It concluded, therefore, that the probative value of Dobreaff's testimony "far outweighed the prejudicial effect thereof" (Appendix "A" p. 15).

Petitioner Mendrin sought to counter the prosecution's innuendo of guilt by association by the presentation of evidence of other attempts made upon the life of the victim Castillo by an organization of black inmates. The effective presentation of evidence necessitated the discovery of prison files, which documented these prior attempts. These same files, or similar files, were sought to be discovered in order to analyze the evidence from which the state formulated its claim alleging petitioner Mendrin's involvement in any prior violent acts upon the victim Castillo. Implicit in this discovery process was the discovery of other victims of other violent acts, and the nature of the groups that allegedly perpetrated these acts.

G. Exclusion of the Witness Pena's Testimony

A theory of the defense was that two black inmates, rather than defendants, stabbed the victim Castillo. The witness Gibbs, who manufactured the murder weapons, testified that he gave them to the victim just prior to the stabbing. The defense attempted to prove that the decedent wanted these weapons to protect himself from black inmates, but was prevented from doing so. The court further prevented the defense from proving that the decedent had expressed bad feelings toward black inmates.

The witness Pena, testifying out of the presence of the jury, established that the decedent had a fight with two black inmates not long prior to the fatal stabbing. This testimony patently was of enormous importance to the defense, but the trial court refused to allow it to be given before the jury, for the reason that the witness refused to name the two black inmates involved. It appears a distinct possibility that, had the jury been permitted to hear the testimony of Pena, it might have come to the conclusion that a very reasonable and real doubt existed as to the responsibility of petitioner for the crime in question. It is interesting to note that the trial court issued an improper gag order to protect prosecution witnesses from reprisals by concealing their names. Yet, it deprived the defense of the Pena testimony when Pena expressed fear of reprisal if he named the previous attackers of the victim.

H. Denial of Access to Pertinent Files

Petitioner Mendrin was denied access to these files by

the trial court, which instructed the prosecutor to examine the files and determine if there was any evidence that would be beneficial to petitioner Mendrin in the preparation of his defense. Petitioner objected to this process, citing the theories of advocacy that form the foundation of our system of justice as being inconsistent and in conflict with *counsel for the state* weighing the probative value of this evidence on the behalf of the defense. Petitioner's arguments fell on deaf ears, and the procedure was implemented as proposed.

Mr. Canty, for the state, determined, allegedly after examination, that the evidence requested by petitioner would not be of sufficient value to warrant its surrender to petitioner or his counsel for discovery purposes.

The appellate court states in its opinion that counsel for petitioner's co-defendant indicated he had received a report of a particular incident, and the opinion goes on to state that "the record reflects that defense counsel were evidently satisfied with the court's solution" (Appendix "A" p. 14). However, petitioner knows of nothing in the trial transcript which would indicate that his counsel was satisfied with such an inadequate substitute for the information requested by him both prior to and during the trial.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are substantial and have a grave and solemn impact upon the administration of criminal justice, not only for petitioner Mendrin but for all potential defendants. The satellite issues presented by the encroachment upon the exercise of a free press in its natural service to an effective and equitable system of justice are

enormous.

A. The Shackling of the Accused

The issue of the necessity of shackling petitioner at trial was not confronted; on the contrary, at no time prior to this ruling did petitioner attempt to escape, nor did he create any disturbance which might conceivably justify the use of the leg irons. Moreover, petitioner had been incarcerated for a non-violent crime.

The Court of Appeal sought justification for the degrading and prejudicial act of shackling by noting that "the crime took place in a state prison facility and defendants were accused of a violent, hideous crime" (Appendix "A" p. 9). The court went further to justify the binding of petitioner Mendrin by recognizing that "the vast majority of the witnesses were felons" and that Mendrin's co-defendant "had been convicted of escape twice . . ." (Appendix "A" p. 9)

While cases are directed toward the issue of whether or not the shackling of an accused is so prejudicial as to deny him a fair trial, there is no definitive rule of law. This practice has been a part of the system of criminal justice since the time one man suppressed another. Shackling connotes the hardened criminal who is so akin to beast that he can be controlled only by bestial methods. In the prosecution of an already-confined man, petitioner respectfully submits that this connotation is inescapable.

It is petitioner Mendrin's contention that a slip-shod attempt at covering up the bindings is undoubtedly more damaging than simply leaving the shackles open for observation. The ineffective attempt at covering the bindings only

draws more attention to the fact that the accused is in fact bound.

The psychology of man is not easily defined, but the injustice of man to his fellow man is easily recognized. No more than the black American might expect separate but equal schools should an accused who is shackled like a beast expect a fair and impartial trial. The fundamental fairness implicit in the constitution is not to be found under these conditions.

Petitioner Mendrin does not here argue that in some circumstances shackling is not justified. Rather, he would submit that the issue should at least be scheduled for debate, so that the court might intelligently consider the advisability of shackling prior to issuing an order.

This Court has recognized that while a trial judge has broad powers to insure order in the expeditious progress of a trial, the power must be exercised with circumspection. It should be invoked only when and to the extent justified by the danger which the defendant's conduct presents or by a real danger of significant interference with the progress or order of the trial. *Bitter v. United States*, 389 U.S. 15, 16. In *Illinois v. Allen*, 397 U.S. 337, 342-343, the Court recognized that every reasonable presumption against the loss of a constitutional right must be considered by the trial court. While a defendant can lose his right, the right should not be lost without cause. See also *Johnson v. Zerbst*, 340 U.S. 458, 464.

The Court in *Allen* recognized that there are three constitutionally permissible ways for a trial judge to handle an "obstreperous defendant":

> "(1) bind and gag him, thereby keeping

> him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

The Court went further to recognize that–

> "no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."

Many cases seem to be consistent with the *Allen* holding. *United States v. Ronstio*, 455 F.2d 366; *State v. Tennant*, 262 La. 941; *State v. Roberts*, 206 A.2d 200; *United States v. Samuel*, 431 F.2d 610; *Way v. United States*, 285 F.2d 253; *United States ex rel. Harbold v. Myers*, 367 F.2d 197; *Dennis v. Dees*, 278 F. Supp. 354; *Ex parte McKay*, 329 U.S. 749.

However, there is a conflict of case law, and there is a substantial line of cases that represent a contrary view, including the case appealed herein. *United States ex rel. Stahl v. Henderson*, 472 F.2d 556; *Gregory v. United States*, 356 F.2d 203 [*distinguished*]; *Golla v. Rhodes*, 162 F. Supp. 589.

The issue, then, appears to be ripe for this Court's determination of the question of a trial court's responsibility to the administration of justice, and the dignity of the court itself in determining whether or not an accused may arbitrarily be shackled before the trier of fact.

B. The Restriction of a Free Press

While the courts, and this Court in particular, have been confronted with the issue of whether an accused has a right to have his trial publicized, there appears to be very little law on the question of whether the accused has a right to have all of the facts in his trial reported by the free press in the ordinary course of its gathering and distributing the news. That is, whether or not a trial court can justifiably impose restrictions upon the press on reporting the occurrences of the trial.

The question more exactly presented by the facts of this case goes to the issue of whether or not a trial court may restrict the free press in reporting the names and publishing photographs of witnesses. While petitioner Mendrin is not asking the Court to decide this First Amendment issue, as it would affect the press directly, that issue is nevertheless implicit in this argument. Petitioner Mendrin's argument goes, rather, to the Fourteenth Amendment (due process) and Sixth Amendment (fair trial) issues and the right of an accused to have full disclosure during the course of his trial, so that any potential recipient of such information distributed by the free press media who has contradictory testimony might come forward and disclose such contradictory information. In this case, the record of the trial court is clear that the news media intended to report such information at trial and that this order specifically restricted the press from so doing. Petitioner Mendrin herein argues that any judicial decree which violates the safeguards of a free press from state suppression should be within the scope of both the First and Fourteenth Amendments *Tribune*

Review Publishing Company v. Thomas, 120 F. Supp. 362.

These issues, however, are not well settled, and cases have held that where the court deems that proper bounds of press publicity are being exceeded, the trial judge should draw clear guidelines and may use inherent powers to impose sanctions, *Corbitt v. Patterson*, 272 F. Supp.602; and publication of trial events in the news media are not necessary to satisfy due process. *Craemer v. Superior Court in and for Marin County*, 265 Cal. App. 2d 216.

In a case arising out of the trial of petitioner Mendrin, brought by a newspaper publisher to compel the Superior Court to annul and vacate the order herein restraining the news media from publishing the names and photographs of the incarcerated witnesses at trial, the Court of Appeal found the order violative of the First Amendment. The court recognized that, in addition to the right of the newspaper company, there was the right of petitioner Mendrin to a fair trial and a free press reporting the occurrences at trial. *Sun Company of San Bernardino v. Superior Court*, 29 Cal. App. 3d 826.

In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, this Court found that a prior restraint on speech imposed by the legislative or executive branches of government amounts to a censorship and should be the subject of close judicial scrutiny. The court in *Sun* found that since the courts are also agencies of the government, the order should also be subject to "a heavy presumption against its constitutional validity." While the right to publication at trial is not absolute, the degree of danger must be extremely serious, as must the degree of eminence be extremely high. *Bridges v. California*, 314 U.S. 252. There should be more than a remote or

probable danger before First Amendment rights are compromised. *United States v. International Union, etc.*, 352 U.S 567; *Craig v. Harney*, 331 U S 367

Petitioner respectfully submits that the same criteria must be weighed just as carefully in the analysis of the violation of an accused's Fourteenth and Sixth Amendment rights as in the case of the violation of the First Amendment's guarantee of the elements of a free press in our republic. The *Sun* court found that, while the inmate witnesses *might* refuse to testify had their identities been revealed, there was no indication, by the state's own admission at trial, that any one of the witnesses would not have come forward absent such an order

> "Therefore, there was an utter failure of proof for the purpose of establishing the necessity of the order on fair trial principles."
>
> *Sun Co. etc. v. Superior Court, supra,* at 829.

The conclusion of the appellate court's ruling in the Mendrin case is utterly inconsistent with the court's ruling in *Sun Co. of San Bernardino*, and effectively results in a deprivation of petitioner Mendrin's rights as guaranteed by both the Sixth and Fourteenth Amendments of the United States Constitution.

C. Guilt by Association

Petitioner Mendrin contends that this guilt-by-association, described in the "Statement of the Case" (item "F" p. 10 *supra*), is violative of his First Amendment right to freedom of association, his Sixth Amendment right to a fair

trial, and his Fourteenth Amendment rights of due process and equal protection of the laws. *Williams v. Rhodes*, 393 U.S. 23; *United States v. Robel*, 389 U.S. 258; *Elfbrandt v. Russell*, 384 U.S. 11; *Aptheker v. Secretary of State*, 387 U.S. 500; *Melton v. City of Atlanta, Georgia*, 324 F. Supp. 315; *Burns v. Pomerleau*, 319 F. Supp. 58; *Goldman v. Olsen*, 286 F. Supp. 35; *Albaum v. Carey*, 283 F. Supp. 3. The Fourteenth Amendment also protects the freedom of association. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539; *Eberhart v. Massell*, 311 F. Supp. 654; *Mabra v. Schmidt*, 356 F. Supp. 620.

This right of association is protected no matter how unpopular the group's aims and philosophy might be. *Green v. Connally*, 330 F. Supp. 1150. The freedom to join or not to join a group of persons, for whatever purposes the association is lawfully founded, is a freedom guaranteed by the First Amendment to the United States Constitution. *Boosier Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Board of the United States*, 412 U.S. 84; *Hanson v. Union Pacific Railroad Co.*, 160 Neb. 669, *reversed on other grounds*, 351 U.S. 225.

The realities of modern prison life dictate that, in order for an individual to survive, or, more exactly, to increase his chances of survival, he must become involved and associated with a group which, by its numbers, will provide protection for the members of the group. Petitioner Mendrin will argue that the high rate of murders in the California prison system provides evidence enough for the proposition that the authorities in the system cannot provide adequate protection for the inmates.

This freedom of association lies at the very foundation of the First Amendment, and perhaps can best be exemplified in the modern prison system, where mere survival dictates association. Prosecutor Canty, at trial, protested several times that the state was not seeking to prove guilt by association. Unfortunately, the admission of this evidence of petitioner Mendrin's association with the Aryan Brotherhood, when taken in conjunction with the testimony of witness Pettijohn, can lead to no conclusion other than the state's desire to show petitioner Mendrin's guilt through his alleged association with the Aryan Brotherhood. The California appellate court attempted to explain away the fact that petitioner had not been incarcerated at the time of the previous attempts upon the victim's life at the Folsom and Vacaville Prisons by stating that "as members of organizations engaged in violence, [defendants] could be expected to participate in violence because of their memberships in such organizations, regardless of who the target was" (Appendix "A" p. 15). Petitioner suggests that such a precedent dangerously treads upon the rights of all future accused persons.

Probably the most startling aspect of this accusation of guilt by association is the foundation upon which it lies. This issue is closely intertwined with facts and issues of the Dobreaff hearsay statement discussed above. Witness Dobreaff's unsolicited hearsay statement, which served as the catalyst in the implication of petitioner Mendrin in the murder of victim Castillo, only compounds the injustice already described. The nature of this foundation substantially serves to relegate this injustice far from the differences of opinion of reasonable men into the theater of the absurd. The net result is a shocking deprivation of rights, which cannot be allowed

to stand

D. **Discovery**

The constitutional rule of law regarding the suppression of favorable evidence by the prosecution after the accused has requested the discovery of such evidence, and where the evidence is material either to guilt or punishment, is well established; that if such suppression occurs, due process will be found to have been violated, irrespective of the good faith or bad faith of the prosecution *Brady v. Maryland*, 373 U S 83, 87 This Court is now asked to confront the more difficult question of whether or not an accused is entitled to discovery beyond a representation by an adversary that the material sought to be discovered is not relevant to the issue at trial

Evidence was presented by the state, at trial, that was substantially based upon discovery conducted by the prosecution in reviewing the prison files of petitioner, his co-defendant, the victim Castillo, and the various inmate witnesses. These files, it would appear, substantially assisted the prosecution in the preparation of its case against petitioner Mendrin

Petitioner Mendrin attempted to discover these files, in order that he would be able to defend himself effectively against accusations of associations and so that he might attempt discovery of potential parties who might have a motive to attack the victim or incrimate Mendrin Implicit in this inquiry was petitioner Mendrin's desire to discover prior attacks within the California prison system by inmates upon the victim Castillo These attacks necessarily involved

a time sequence prior to the incarceration of Mendrin and at a location other than the institution in which petitioner had been incarcerated

Petitioner was denied access to these prison files by the court, on the pretext that the files might potentially contain information which might be damaging if discovered by the prison community at large. The trial court, in denying petitioner's motion for discovery, instructed the prosecutor to examine the pertinent files and determine, in his mind, whether or not there was any evidence that would be beneficial to the petitioner in the preparation of his defense. Citing Section 1040(b)(2) of the California Evidence Code, the appellate court found that the evidence sought to be obtained by petitioner Mendrin was confidential and should not have been disclosed (Appendix "A" p. 13)

While it is difficult in this case to determine whether or not the files sought to be discovered by petitioner Mendrin would actually have led to additional evidence which might have discredited the evidence of the prosecution, or contradicted it, the issue remains whether or not the adversary system–which justifiably and rightfully smacks of counsel's prejudice in favor of his client–will in fact place a prosecutor in the best position to analyze and weigh the value of evidence to a defense counsellor. Presumably, counsel who is advocating a position will have given more thought to the preparation and structure of his defense than will his opponent, and thus it would appear that he would be in a better position to judge and weigh potential evidence. It would seem to be inconsistent with the very foundations of the adversary system to expect one's opponent to be in the best position to weigh relevant evidence and determine whether

or not it would lead to admissible evidence.

In this case there would appear to be an adequate basis to assume that an examination of prison files would reveal that there had been bad blood between victim Castillo and other racially-oriented groups. Petitioner Mendrin believes the files would have led to admissible evidence of prior attacks upon the victim by these groups and circumstantial evidence of threats upon the victim's life.

The prosecutor argued that this evidence would not be admissible, even if it were discovered. But, in light of the admissibility of almost identical evidence on behalf of the state indicating petitioner Mendrin's alleged predisposition to commit a violent act upon the victim, petitioner must assume that identical evidence involving other persons would also have to be admissible. To rule otherwise would be a clear deprivation of petitioner Mendrin's right to equal protection and due process under the Fourteenth Amendment.

Petitioner Mendrin does not argue that the Fourteenth Amendment requires the state to adopt discovery procedures for the benefit of an accused, but, in the absence of a strong showing of contrary state interests, any discovery procedure should be a two-way street. *Wardius v. Oregon*, 412 U.S. 470. Nor does due process require the state to open its files for what might be regarded as fishing expeditions *McGarriety v. Beto*, 335 F. Supp. 1186, *affirmed* 452 F.2d 1206. But, where there is a showing of at least a reasonable possibility that materials might be of significant probative value in determining the guilt or innocence of an accused, to disallow discovery effectively amounts to a deprivation of due process. *Buchalter v. People of the State of New York*, 319 U.S. 427. The ability of an accused to meet the prosecutor's case with

the aid of witnesses and evidence is historically, and in practice, fundamentally necessary to the execution of a fair trial. *MacKenna v. Ellis,* 280 F.2d 592, *modified on other grounds,* 289 F.2d 928, *cert. denied* 368 U.S. 877. The Supreme Court of the State of California erred, then, by denying the hearing requested by petitioner Mendrin. *Asbury v. Oliver,* 318 F. Supp. 44. The confrontation and cross-examination of witnesses is a fundamental requirement of a constitutionally fair trial, and to withhold the right to the full protection of due process fundamental to a fair trial from some defendants and to grant it to others similarly situated is an untenable result. *Parker v. Gladden,* 385 U.S. 363.

Moreover, the court's denial of petitioner Mendrin's motion to discover evidence of other parties involved in a possible conspiracy to murder victim Castillo deprived petitioner Mendrin of his constitutional right of confrontation and cross-examination. *Pointer v. Texas,* 380 U.S. 400; *California v. Green,* 399 U.S. 149; *Berger v. California,* 393 U.S. 314.

E. The Totality of the Circumstances

Petitioner Mendrin respectfully suggests that herein are stated no less than six compelling reasons why his conviction should be reversed and remanded. However, undoubtedly the most compelling reason of all has not as yet been stated. The issues aforementioned are grave issues of social injustice. They are issues that separately arise in criminal trials in the United States daily. The social impact in clarifying these issues is enormous.

Even more compelling, at least in terms of this petitioner's individual case, is the totality of the circumstances which

occurred at and during his trial which resulted in a verdict of guilty. The Court is here confronted with a gross fact situation where a man was shackled at trial without a pre-trial hearing on the necessity of a shackling; that same man was denied the fairness and equity of a free reporting in the press at trial; that same man was cast in a conspiracy of guilt by association, based primarily on what otherwise might usually be regarded as excluded evidence; that same man was not allowed to offer direct evidence of the motive of a third party to commit the murder of the victim; that same man was denied access to pertinent data that formed the foundation of the prosecution's evidence against him, and which may just as well have provided evidence which would have supported his attempted offering of evidence as to the motive of others to have committed this crime; and that same man was therefore denied the fundamental fairness that forms the basis of our free society which is embodied in the Constitution of the United States of America

CONCLUSION

Petitioner Mendrin respectfully requests that the conviction be reversed and that this case be remanded for trial under appropriate instructions

Respectfully submitted,

DONALD N BELVEAL

Attorney for Petitioner

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APPENDIX "A"

OPINION OF THE COURT OF APPEAL

In the Court of Appeal, Fourth District, Second Division, State of California.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, -v- DONALD RAYMOND HALE and FRED STEVE MENDRIN, Defendants and Appellants.

4 Crim. 5892 (Sup. Ct. No. CRW-2675).

[FILED May 10, 1974]

APPEAL from a judgment of the Superior Court of San Bernardino County. Richard C. Garner, Judge. Affirmed.

Patrick J. Morris for Defendant and Appellant Donald Raymond Hale.

Kenneth W. Nydam and Donald N. Belveal for Defendant and Appellant Fred Steve Mendrin.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Daniel J. Kremer, Harley D. Mayfield and Alan S. Meth, Deputy Attorneys General, for Plaintiff and Respondent.

The defendants ("Hale" and "Mendrin") were convicted by jury of first degree murder (Pen. Code, §§ 187, 189) for stabbing Fred Castillo to death on April 21, 1972 while imprisoned at the California Institution for Men at Chino. Both defendants were given life terms and appeal.

Defendants raise nine issues. We have determined that they enjoyed a fair trial and affirm the conviction of each.

To understand the motive behind the slaying, some discussion of life within the prison system appears advisable, particularly with reference to the fanatical ideological organ-

izations which flourish therein These organizations are criminally oriented Among those at Chino are the Aryan Brotherhood and the American Nazi Party. Both have a white-racist philosophy. The Aryan Brotherhood is composed of inmates who at one time belonged to other groups and organizations such as the Bike Rider clubs and Nazi Party The American Nazi Party is more pro-Hitler in its feelings, with the major emphasis being on the killing of blacks and Jews

These foul groups frequently engage in illegal activities within the prison system One of their common purposes is to eliminate or silence informers ("rats") who cooperate with the authorities by reporting the illegal activities of members of the respective organizations Occasionally, a "contract" is put out to kill certain "rats." The Aryan Brotherhood, the Nazi Party, and the Mexican Mafia sometimes act as a coalition to carry out these contracts To counteract potential violence, the prison authorities often place informers (and other inmates whose lives are in danger, such as homosexual victims) in protective custody, i.e., segregate them from the remaining prison population

Before being confined at Chino, Castillo was an inmate at Folsom. At Folsom, an unsuccessful attempt was made on his life by some members of the Aryan Brotherhood

After his transfer to Chino, Castillo was confined in Palm Hall At that time, Palm Hall was a housing unit which contained two types of inmates: (1) the aforesaid protective custody inmates; and (2) management inmates, i.e , those inmates who are deemed so assaultive and dangerous that they require special attention and maximum security Protective custody inmates were separately housed on the west side of Palm Hall and the management inmates were housed

on the east side. The two wings were physically separated and generally, the two sides did not mix in common areas. When the protective custody inmates visited or exercised in common areas such as the yard or the dayroom, the management inmates were locked out of that area. However, the Palm Hall kitchen crew was composed of inmates from both sides who had access to both wings as well as the recreation room and yard.

Hale and Mendrin were both management inmates. However, they were also members of the kitchen crew. Hale was a member of the American Nazi Party; Mendrin was a member of the Aryan Brotherhood

Since the abortive attack on Castillo's life at Folsom, a contract still existed to kill him.

About two weeks before the killing, Hale and Mendrin discussed the necessity of killing Castillo with some other inmates in the Palm Hall kitchen.

About 9 a.m. on April 21, 1972, Hale and Mendrin finished their duties in the kitchen and were in the dayroom. Castillo entered. Several other inmates passed through the dayroom and entered the yard. In order to reach the yard from the dayroom it is necessary to go through a corridor or passage known as the "sally port." Mendrin lured Castillo into the sally port area on the pretense of giving him some artane (a drug used to control tremors); Mendrin grabbed Castillo by the shoulders; Hale held Castillo by the collar; Hale stabbed Castillo in the stomach; Mendrin stabbed him in the face, chest and stomach; when Hale finally let go of Castillo and fled the scene, Mendrin continued stabbing him Belatedly, some of the other inmates came to Castillo's aid, striking Mendrin. Mendrin's shirt was saturated with Castillo's

blood. Later, traces of Castillo's blood type were found on Hale's clothing.

Hale and Mendrin each used a long, thin knife or dagger made out of bedsprings in the stabbing. (These weapons are commonly fashioned in prisons.) Mendrin was observed with the weapon in his hand at the time the mortal blows were being inflicted. Hale was observed after the stabbing with a similar weapon in his hand. Both weapons were found near the scene—one where Castillo was lying; the other in the corner of the sally port.

Castillo was removed to the prison hospital covered with blood, in deep shock and unconscious; there were numerous stab wounds in his face, chest and upper arms. He died within a few minutes as a result of the stab wounds of the left lung.

While awaiting trial, Hale and Mendrin were confined in Cypress Hall at Chino. On June 16, 1972, Mendrin made a statement, in Hale's presence, to a group of other prisoners to the following effect: he had obtained a list from his attorney of all the witnesses against him; the witnesses and their families would be taken care of; furthermore, Mendrin also described the killing: he went into the dayroom to talk to Castillo; he offered Castillo a bottle of artane; Castillo replied he wanted it; they went to the sally port; Mendrin kneeled down and when Castillo reached for the artane, he and Hale began stabbing him; it felt so good to stab Castillo that he never wanted to quit. In response to a question from one of the inmates present, Mendrin replied that the weapons were brought to him by inmate Nick Velasquez.

Again during June 1972, one of the prosecution witnesses (Pettijohn) asked a correctional sergeant to transfer him from Cypress Hall to Palm Hall; he claimed that Hale,

Mendrin and several other inmates had threatened to kill him; these inmates were members of the Aryan Brotherhood; because he was supposed to have testified against someone, they had a contract out on him. Pettijohn also told the sergeant about the conversation he had overheard on June 16 between Mendrin and the other inmates concerning Castillo's killing.

During the trial, the prosecution called some 11 inmates who were either eyewitnesses to Castillo's killing or knew something about the motive behind the killing. Before the witnesses were called, the trial judge issued an Order re Publicity ("gag order") prohibiting the news media from printing the names or photographs of the inmate-witnesses to be called by the prosecution. The media abided by the order, so the inmates' names or identities were not reported, although the names of the prospective prosecution witnesses had been furnished to defense counsel prior to trial.

Defendants both testified and called several inmate-witnesses on their behalf. Hale admitted he had been in the dayroom at 9 a.m. but claimed he left at 9:05 before the attack on Castillo; he denied entering the sally port area, seeing Castillo, threatening Castillo, or having a weapon and stabbing Castillo. In addition, he called several alibi witnesses.

Mendrin admitted being in the dayroom but claimed that when he entered the sally port area, Castillo was being attacked by several other inmates; that he attempted to go to Castillo's aid; he grabbed Castillo, pulled him away from the assailants, and they both fell to the floor; he continued to help Castillo and when some of the other inmates arrived, they thought he was trying to harm Castillo and they attacked him; he denied stabbing Castillo, denied manufacturing the weapons, and denied threatening any prospective prosecution witnesses.

GAG ORDER

Although the media honored the trial judge's gag order, two newspapers brought a mandamus proceeding for the purpose of having the order vacated. Following defendant's trial, this court ruled that the Order re Publicity (gag order) was constitutionally invalid as being violative of First Amendment rights. (See *Sun Co. of San Bernardino v. Superior Court*, 29 Cal. App. 3d 815.) Defendants now maintain that they were denied their right to a public trial (U. S. Const., 6th Amend.; Cal. Const., art. I, § 13) by reason of the issuance of the order.

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice of the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. The knowledge that every criminal trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power. (*In re Oliver*, 333 U.S. 257, 268 [92 L. Ed. 682, 691, 68 S. Ct. 499, 505].)

The trial should be public in the ordinary common sense acceptation of the term; the doors of the courtroom are expected to be kept open, the public is entitled to be admitted, and the trial is to be public in all respects with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial; a public trial is generally associated with the idea of "the open courtroom" in which the proceedings are "open to the public view"; a public trial means one which

is not limited or restricted to any particular class of the community but is open to the free observation of all. (*People v. Hartman*, 103 Cal 242; *Cembrook v. Sterling Drug Inc.*, 231 Cal. App. 2d 52, 58 - 59) However, the right to a public trial does not carry with it the concomitant that the trial be publicized in news media; as long as the doors of the courtroom are open so that a reasonable proportion of the public is allowed to attend, the right to a public trial is satisfied; whether the proceedings are publicized by the news media or others in attendance is purely incidental to this right. (*Cembrook v. Sterling Drug Inc., supra*, 231 Cal. App. 2d 52, 60.)

Defendants maintain that they were prejudiced by the gag order because it thereby became impossible for interested inmates or other readers of the newspapers to come forward and reveal what they knew which might have been helpful to the defense. But this argument has been advanced and rejected before. While it is true that one of the purposes of a public trial is that witnesses unknown to the parties, or their counsel, and having knowledge of matters pertinent to the trial, might be drawn to it, there is no authority which holds that such purpose must be attained by publicity in the news media; that positing of a denial of a public trial on the remote possibility that someone might have come forward is certainly speculative and would amount to a holding of publicity in the news media is necessary to a public trial. (*Cembrook v. Sterling Drug Inc., supra*, 231 Cal. App. 2d 52, 60.)

Moreover, defendants' argument, aside from being speculative, lacks merit for the obvious reason that the gag order imposed herein did not ban publication of information

re defendants' trial. It merely prohibited the reporting of the names or photographs of the prosecution witnesses who happened to be prison inmates. Defendants do not argue that the trial was unpublicized. Indeed, they cannot make that argument for it was conceded in the aforesaid original proceeding (*Sun Co. of San Bernardino v. Superior Court, supra,* 29 Cal. App. 3d 815) that defendants' trial was well reported and received more publicity than the usual prison killing because of the imposition of the gag order. Therefore, the implication exists that all potential witnesses within the institution either knew about the killing or were kept apprised through the media of the daily events of the trial itself, so no serious claim can be made that defendants were deprived of the testimony of any possible witness. In short, defendants had a public trial which was well publicized.

SHACKLES

Prior to trial, defense counsel made a motion that the authorities be required to remove the leg irons from the defendants so they would not appear in shackles during the course of the trial. The court reserved ruling on the motion but suggested that a "modesty panel" be placed in front of the counsel table so that the leg irons would not be visible to the jury. On the day the trial started, the defendants were shackled and the court denied the motion to remove the shackles but did direct the jailers to bring the defendants to the courtroom for all sessions before the jurors were brought in, and not to remove the defendants from the courtroom until all of the jurors had left the courtroom. Mendrin now claims that the court erred in denying the defense motion to

remove the leg irons.

Generally, the amount of court security is a matter of discretion with the trial judge (*People v. Chessman*, 38 Cal. 2d 166.) Whether restraints are to be placed on a defendant during trial is a matter within the sound discretion of the trial judge; he is in the best position to determine what the relevant factors are; in order to overcome the presumption that the trial judge performed his duty, the defendants must show that there was no basis whatsoever for the restraints to be employed; absent such a showing, the trial court's judgment will not be second-guessed on appeal. (*People v. Coleman*, 32 Cal. App. 3d 853, 859.)

Here the crime took place in a state prison facility and defendants were accused of a violent, hideous crime. The vast majority of the witnesses were felons. Hale had been convicted of escape twice, once with force. Both Hale and Mendrin were high security risks which was the reason for their confinement in the east wing of Palm Hall. Precautions were taken that the jurors would not see the leg irons. In view of the foregoing factors, the trial court acted with propriety in denying the motion.

GRAND JURY

Defendants next contend that the trial court erred in denying their motion to quash the grand jury indictment on the ground the grand jury was not fairly selected and was not comprised of their peers. In support of their argument, defendants maintain that they were felons and there were no felons on the grand jury and that persons in the 28 - 30 age group (their age group) were not members of the grand jury.

While it is axiomatic that grand juries must be selected in a manner which does not systematically exclude, or substantially underrepresent, the members of an identifiable group in the community (*Whitus v. Georgia,* 385 U.S. 545, 548-552 [17 L. Ed. 2d 599, 602-605, 87 S. Ct. 643, 645-648]; *In re Wells,* 20 Cal. App. 3d 640, 649), the defendant has the burden of proving that persons within an identifiable group in the community were intentionally and systematically excluded from the jury panel. (*People v. Sirhan,* 7 Cal. 3d 710, 752-755.)

Here the record merely reflects that the defendants were originally indicted by the grand jury for murder and they moved to quash the grand jury indictment and for a dismissal. (Pen. Code, § 995.) The hearing on the motion was scheduled for July 7, 1972 and was apparently continued to September 22 and then to September 29. However, the record does not reflect whether a hearing was held on either date. In short, there is nothing in the record relating to the hearing on the motion to quash and the motion to dismiss. The failure of the defendants to include a proper transcript as part of the record precludes them from seeking appellate review of that issue. (*People v. Siegenthaler,* 7 Cal. 3d 465, 469; Calif. Rules of Court, rule 4(a).)

FIRST DEGREE MURDER

Hale contends the evidence is insufficient to support his conviction of murder in the first degree. In support of his argument, he claims: (1) there was no evidence he committed any of the acts which resulted in Castillo's death; and (2) the evidence of premeditation amounted to no more than

speculation or conjecture.

While the quantum of evidence against Hale was not quite as formidable as that against Mendrin, there was strong proof indicating that he participated in the planning stages of the murder and was an active participant in the killing itself.

The type of evidence found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) evidence of planning activity; (2) evidence demonstrating motive; and (3) evidence indicating that from the *manner* of the killing, it must have been accomplished according to a preconceived design. (*People v. Anderson*, 70 Cal. 2d 15, 26-27.)

Turning to the "planning" concept, the evidence indicated that a few days prior to the killing, Hale was present at a meeting when the statement was made "that they had to get him [Castillo] now before he left [Chino] . . . . " Hale and Mendrin were armed when Mendrin lured Castillo to the sally port area; their weapons were handmade; either Hale or Mendrin or both made the weapons or secured them from someone else and the weapons were obviously contraband; eighteen (18) days prior to the killing, a weapon similar to the murder weapons was found outside of Mendrin's cell; after this weapon was discovered, Mendrin evidently made other arrangements for obtaining the two other weapons from inmate Velasquez; after the killing, Mendrin stated that he had offered Castillo a bottle of artane; Mendrin and Hale impliedly knew that Castillo used the drug for it was employed as a lure to induce him into the sally port; a bottle of artane, like a weapon, is not easily available in prison; it required some planning to obtain it in order to

use it as bait; in addition, Mendrin told another inmate 1 - 2 hours prior to the killing that they were "going to hit Fred [Castillo]."

Turning to the evidence of motive, Mendrin and Hale were members of the Aryan Brotherhood and American Nazi Party, respectively. Castillo had been marked for extinction because he had apparently "ratted" on some members of the Brotherhood; when Castillo was incarcerated at Folsom, Eddie Vaughn–a member of the Aryan Brotherhood–had made an unsuccessful attempt on Castillo's life; it was well known in the prison system that there was a contract out to kill Castillo and that the Aryan Brotherhood and the American Nazi Party had formed a coalition to carry out the contract; from the foregoing evidence, the jury could infer deliberation and premeditation.

Finally, there was solid eyewitness testimony indicating Hale was a participant in the stabbing. In addition, he admitted being in the dayroom just before the stabbing and traces of Castillo's blood were found on his clothing.

MANSLAUGHTER INSTRUCTION

Defendants contend the trial court committed error in failing to give a *sua sponte* instruction on manslaughter as a lesser included offense. In support of the argument, Hale suggests that he might have participated in the killing solely as a result of sudden anger, passion or fervor in witnessing the fight. However, Hale's defense was alibi and Mendrin's defense was that he was merely a Good Samaritan who tried to assist Castillo after Castillo had been attacked by some other inmates. Neither suggested at the trial that

they became involved in the offense in the heat of passion.

In criminal cases, the court must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Wilson*, 66 Cal. 2d 749.) Where evidence supports a finding of murder or manslaughter, failure to give an instruction on manslaughter is reversible error. (*People v. Dewberry*, 51 Cal. 2d 548.) However, the trial court is not required to give an instruction on a lesser included offense unless there is evidence on the issue sufficient to alert the trial judge that it is an issue in the case. (*People v. Cram*, 12 Cal. App. 3d 37, 41-42.) Here there was just no evidence suggesting that manslaughter was an issue in the case and there was no duty on the part of the trial court to instruct on manslaughter. (See *People v. Duren*, 9 Cal. 3d 218, 236.)

DISCOVERY

Prior to trial, the trial court refused to grant the defendants discovery of the central files and records maintained by the Department of Corrections pertaining to the 11 prosecution witnesses who were prison inmates. In addition, the defendants were denied access to Castillo's prison file. They argue that refusal to grant them this discovery deprived them of the opportunity to present a possible crucial defense.

During the trial, the defense renewed their motion for discovery of the inmate files of the protective custody witnesses called by the prosecution. The court denied the motion on the ground that the evidence sought lacked relevancy. (Evid. Code., § 350.) While the evidence sought undoubtedly was irrelevant, it was also confidential and should not have been disclosed. (Evid. Code, § 1040(b)(2); *Procunier v. Superior*

Court, 35 Cal. App. 3d 207.) *In re Olson*, 37 Cal. App. 3d 783, cited for the contrary proposition by defendants, is not in point; it sets forth only a right for prison inmates to view their *own* files in connection with parole hearings.

Not only were the witnesses' files confidential, the victim's central file constituted privileged information. However, the motion for discovery requested information on any assaultive incidents in which Castillo may have been involved either as the aggressor or the victim. Following discussion between the court and counsel, the court directed the deputy district attorney and a member of the Department of Corrections to review Castillo's file and give to the defense any information relating to that issue. Shortly thereafter, the prosecutor inspected Castillo's file and delivered to defense counsel all relevant reports. Hale's counsel indicated he had received a report of a particular incident and the record reflects that defense counsel were evidently satisfied with the court's solution. Therefore, defendants have no basis to complain now that they were denied discovery.

EVIDENCE

Hale and Mendrin both maintain that it was error for the trial court to admit the testimony of inmate Pettijohn concerning the prior attempt on the life of Fred Castillo at Folsom. Defendants claim the evidence was hearsay, inflammatory and prejudicial. In addition, Mendrin argues that the trial court committed serious error in allowing Paul Dobreaff, a prison administrator at Chino, to testify as to the existence of the illegal organizations within the prison system and that a contract had been "put out" by

the Aryan Brotherhood and the American Nazi Party to kill Castillo.

The trial court properly ruled that Pettijohn could only testify as to what he *observed* at the time of the prior attack on Castillo's life and that he could not testify as to what he *heard* on that occasion. Likewise, Dobreaff was only permitted to relate what he knew. Therefore, the only question is whether the trial court correctly decided whether the probative value of their testimony outweighed the prejudicial effect thereof. (See Evid. Code, § 352.)

Relevant evidence is admissible. Evidence in criminal cases is relevant when it tends logically, naturally and by reasonable inference to establish any fact material for the People or to overcome any matters sought to be established by the defense. (*People v. Durham*, 70 Cal. 2d 171, 186.) The existence of a motive for the crime is a circumstance bearing on guilt or innocence. (*People v. Smith*, 204 Cal. App. 2d 797, 802.) The weight to be given such evidence is for the jury. (Evid. Code, § 312.)

The testimony that other members of the Aryan Brotherhood had attempted to take Castillo's life on a prior occasion tended, by reasonable inference, to establish a motive for the killing. Therefore, Pettijohn's testimony had probative value. Similarly, it was proper for Dobreaff to testify, based on his own knowledge, that the Aryan Brotherhood had a contract out on Castillo's life.

Mendrin and Hale were members of hate organizations which had common purposes and worked in conjunction with each other. In view of the fact that the Brotherhood had tried to kill Castillo before and in view of the defendants' joint interest in the work of that organization, such

evidence tended to explain defendants' involvement in the killing and provided a motive therefor. Consequently, the testimony of both witnesses was relevant.

Turning to the issue of prejudice, no claim was made that Mendrin and Hale had participated in the prior attack on Castillo at Folsom. Nevertheless, as members of organizations engaged in violence, they could be expected to participate in violence because of their memberships in such organizations, regardless of who the target was. Motive was a serious issue in this case and the killing would have appeared senseless if there had not been some explanation given as to why Hale and Mendrin stabbed Castillo to death. Consequently, the probative value of Pettijohn's and Dobreaff's testimony far outweighed the prejudicial effect thereof.

In his final attack on the trial court's evidentiary rulings, Hale contends that Pettijohn's testimony pertaining to the incriminating statements made by Mendrin at Cypress Hall in June following Castillo's death should have been ruled inadmissible as to him (Hale). Hale claims that the evidence was inadmissible but does not say why. Mendrin's statements were admissible as admissions of a party (Evid. Code, § 1220). As to those statements made by Mendrin wherein he indicated that he and Hale worked together to bring about Castillo's demise, such statements were admissible against Hale as adoptive admissions (Evid. Code, § 1221) inasmuch as Hale was present at the time and Hale said he would let Mendrin do the talking because he was too far away from the point where the other prisoners were assembled and did not want to holler. (*People v. Chavez*, 50 Cal. 2d 778, 790.)

MISTRIAL

On direct examination, Dobreaff testified that to his knowledge the Aryan Brotherhood had a contract out to kill Castillo. On cross-examination, Mendrin's counsel began to explore the source of Dobreaff's information: his first question was whether Dobreaff had learned of the contract from any member of the Aryan Brotherhood; Dobreaff replied he had not but then volunteered that Castillo had told him of the contract; Mendrin's counsel moved to strike the answer and the court granted the motion, struck the answer and admonished the jury to disregard the answer; thereafter, Mendrin's counsel moved for a mistrial and defendants now maintain on appeal that the court erred in denying the motion.

A trial judge has broad discretion in determining whether to grant or deny a motion for mistrial. Immediately after Dobreaff volunteered that Castillo had informed him of the contract, the trial court properly struck the answer and admonished the jury to disregard it. It is presumed the jury followed the court's instruction. (*People v. Seiterle*, 59 Cal. 2d 703, 710.)

The trial court also acted with propriety in denying the motion for a mistrial. Defense counsel was endeavoring to weaken Dobreaff's testimony to the effect that a contract to take Castillo's life existed; if he could have demonstrated that Dobreaff had been misinformed or had no actual knowledge of the existence of the contract, it would have weakened Dobreaff's credibility. Dobreaff's answer was not given in bad faith, but was an honest attempt to explain one of the sources of his information. The court's admonition was

sufficient to cure the witness' mistake in answering the question.

DEPRIVATION OF CRUCIAL DEFENSE

Mendrin complains that the trial court prevented him from presenting certain crucial defense evidence which would have shown that two black inmates killed Castillo, not him and Hale.

While it is a perfect defense to show that some other person (and not the defendant) committed the crime, the question is what kind and quality of evidence is essential to that end; evidence which simply affords a possible ground of possible suspicion against another person is inadmissible; mere evidence of motive in another person, or of motive coupled with threats of such third person, is inadmissible unless combined with other evidence tending to directly connect the third person with the actual commission of the crime charged; therefore, proof of motive in a third person, standing alone, is not sufficient; otherwise it would be possible to show that hundreds of other persons had some motive against any decedent who led an active and aggressive life. (*People v. Mendez*, 193 Cal. 39, 52; *People v. Hayden*, 30 Cal. App. 3d 446, 449.)

Here, defense witness, Charles Gibbs, testified he manufactured the murder weapons at Castillo's request and gave the weapons to Castillo. However, the court properly ruled that Gibbs could not testify what Castillo told him as to the reason he requested the weapons. The defense offered to prove that Castillo told Gibbs he required the weapons for the purpose of protecting himself and a friend from some

blacks in the facility, but the offer was refused. Mendrin complains that the trial court should have allowed this testimony. However, the proffered evidence was rank hearsay and Mendrin points to no exception by which the evidence should have been admitted. The fact Castillo felt some black inmates did not like him would not constitute a statement against interest. (See Evid. Code, § 1230.) Nor would the proffered evidence come within the contemporaneous statement exception to the hearsay rule (Evid. Code, § 1241). Subsection (b) requires the statement be " . . . made while the declarant was engaged in such conduct." Here, Gibbs discussed the transfer of the weapons with Castillo on two occasions; once, about three days before the transfer; and again, on the morning of the transfer. Mendrin's offer of proof was that Castillo's statements were made on one or both of these occasions. However, the actual transfer occurred during the lunch hour, according to Gibbs. Therefore, Castillo's statements were not contemporaneous with the event and were inadmissible.

Finally, in connection with this point, it should be noted that Castillo's statement and conduct were not part of the transaction in issue, to wit, the killing and, therefore, would not qualify under the spontaneous statement exception to the hearsay rule. (Evid. Code, § 1240; *People v. Finkelstin*, 98 Cal. App. 2d 545, 558.)

Mendrin also complains that the trial court erred in not permitting one of his defense witnesses to testify that while he and Castillo were incarcerated together in the San Bernardino County Jail, Castillo made some threats against some other inmates. However, the same witness did testify that while he and Castillo were in jail together in March 1971,

Castillo manufactured and was in possession of contraband weapons, but the trial court denied an offer that Castillo had threatened other inmates at the San Bernardino County Jail on the ground that the evidence was irrelevant. The court was correct. Hale and Mendrin testified that they did not kill Castillo. Had the defense been self-defense, it could have been argued that there was a connection between Castillo's purported aggressive behavior and the killing. But Hale's defense was alibi and Mendrin claimed he was trying to aid Castillo. Consequently, it made absolutely no difference whether Castillo had at one time threatened other inmates. (Evid. Code, § 350)

Lastly, Mendrin contends the trial court erred in refusing to permit Gary Pena to testify about a fight between Castillo and two black inmates. On direct examination, defense witness Pena testified that Castillo had been involved in a dispute with some blacks. The district attorney objected to that line of questioning and a hearing was held outside of the presence of the jury for the purpose of determining whether such evidence was admissible. During the hearing, Pena testified there was an altercation between Castillo and members of the black race but he refused to identify the blacks by name. The trial court then properly ruled that Pena could not testify as to a dispute between Castillo and some black third parties as they were not the same blacks who Mendrin claimed actually did the killing. In addition, the ruling was also proper because Pena refused to identify the black inmates with whom Castillo fought. That refusal alone was a sufficient basis for the trial court to strike part or all of his direct testimony. (*People v. Hathcock*, 8 Cal. 3d 599, 616.)

The judgment of conviction of each defendant is

affirmed.

/s/ Kerrigan, J.

We concur:
/s/ Gardner, P.J.
/s/ Tamura, J.

APPENDIX "B"

ORDER DENYING HEARING
After Judgment By The Court Of Appeal
4th District, Division 2, Crim. No. 5892

In the Supreme Court of the State of California - in bank.

PEOPLE v. HALE ET AL.
Order Due August 8, 1974

[FILED Aug. 7, 1974]

Appellant's (Steve Mendrin) petition for hearing DENIED.

/s/ Wright, Chief Justice

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on NOVEMBER 4, 1974, I served the within PETITION FOR WRIT OF CERTIORARI (FRED STEVE MENDRIN, Petitioner, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL, STATE OF CALIFORNIA
500 WELLS FARGO BANK BUILDING
FIFTH AND CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814
(3 copies)

ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012
(2 copies)

CLERK, SAN BERNARDINO SUPERIOR COURT
351 NO. ARROWHEAD AVE.
SAN BERNARDINO, CA. 92401
FOR: HONORABLE RICHARD C. GARNER, JUDGE
(1 copy only)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOVEMBER 4th, 1974, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

In The Supreme Court of The United States

October Term, 1974

No. 74-540

FRED STEVE MENDRIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

BRIEF OF RESPONDENT IN OPPOSITION

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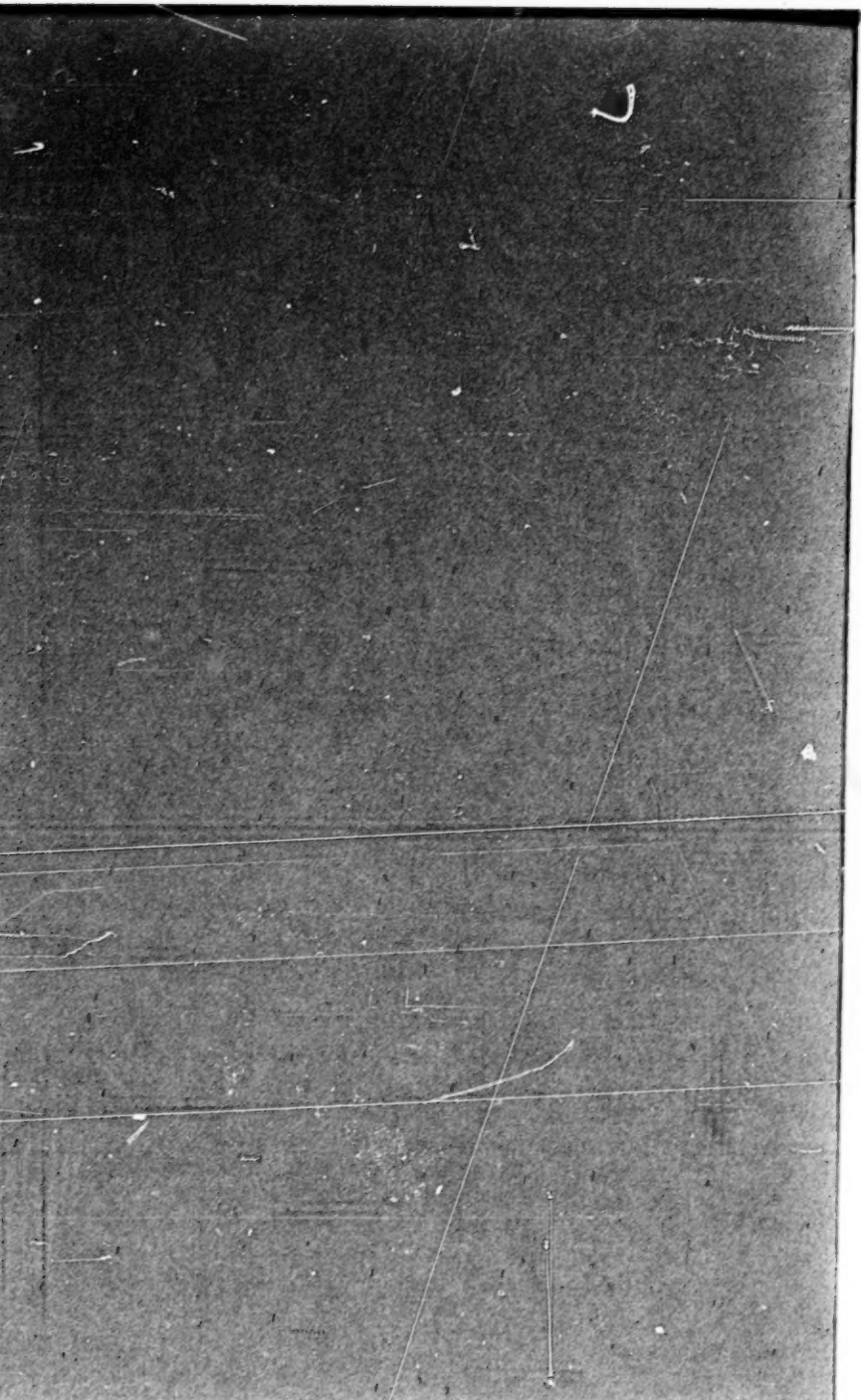

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-540

FRED STEVE MENDRIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, appears in Appendix A to the Petition.

QUESTIONS PRESENTED

1. Whether the trial court's ruling that petitioner, a high security risk charged with a calculated, violent crime, must wear leg irons during trial presents a substantial federal question.

2. Whether this Court has jurisdiction to entertain a challenge to the fairness of the trial on due process grounds because of the trial court's order limiting publication by the news media of the identity of the prisoner witnesses when petitioner failed to preserve the issue below.

3. Whether this Court has jurisdiction to review a contention not raised below regarding the trial court's exercise of its discretion in admitting certain relevant evidence.

4. Whether this Court has jurisdiction to entertain petitioner's contention he was deprived of due process when he was not permitted to personally examine confidential prison files when petitioner agreed below to the discovery techniques employed.

STATEMENT OF THE CASE

In an indictment returned by the Grand Jury of San Bernardino County on May 26, 1972, petitioner Fred Steve Mendrin and his co-defendant, Donald Ray Hale were charged with murder (California Penal Code section 187). (CT 1.) 1/

Petitioner pleaded not guilty and a jury trial commenced before Judge Garner. On November 29, 1972, the jury returned a

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1. As used herein "CT" refers to the Clerk's Transcript on appeal and "RT" refers to the Reporter's Transcript on appeal. We assume petitioner has furnished copies of these transcripts to the Court, but if he has not, and this Court so desires, respondent will make his copies available.

verdict finding petitioner guilty of murder in the first degree. (CT 5, 115.) On December 15, petitioner was sentenced to the state prison for the term prescribed by law. (CT 163-66.)

The judgment was affirmed on appeal by the California Court of Appeal for the Fourth Appellate District, Division Two on May 10, 1974. On August 7, 1974, a petition for hearing in the California Supreme Court was denied. Appendix B to Petition, p. 21.

The pertinent facts at trial were set forth in the Opinion of the California Court of Appeal, Fourth Appellate District, Division Two and can be found in Appendix A to the Petition, pp. 1-6. Pertinent facts may also be found in Sun Co. of San Bernardino v. Superior Court, 29 Cal. App. 3d 815, an Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, involving one aspect of the trial in this case.

ARGUMENT

I

THE TRIAL COURT'S RULING THAT PETITIONER MUST WEAR LEG IRONS WAS NOT AN ABUSE OF ITS DISCRETION AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

In his first of four specific reasons for the granting of certiorari, petitioner contends he was denied a fair trial by the trial court's ruling that he was to wear leg irons during trial. Pet. 14-16.

Prior to trial, the question of whether petitioner was to wear leg irons arose and the court reserved ruling. The court suggested, however, ". . . that if a modesty panel were to be placed in front of the counsel table that there would be no prejudice to the defendants if they wore leg irons. . . ." (CT 13.) On October 24, the date trial commenced, petitioner was not in handcuffs or waist chains but was wearing leg irons and the court ruled petitioner was to be seated at counsel table before the jurors were brought in and was to remain seated until all of the jurors left the courtroom. The court then denied petitioner's motion to remove his leg irons. (CT 16.)

As petitioner acknowledges (Pet. 15), the law is well established that whether restraints are to be placed upon a defendant at his trial is a matter within the sound discretion of the trial judge. A long line of cases in California adhere to the view that it is the trial judge who is in the best position to determine what the relevant

factors are; to overcome the presumption of faithful performance of a judge's duty, the accused must show there was no basis whatsoever for the restraints employed. People v. Coleman, 32 Cal. App. 3d 853, 859; People v. Earl, 29 Cal. App. 3d 894, 900-01; People v. Pena, 25 Cal. App. 3d 414, 425-26; People v. Morris, 20 Cal. App. 3d 659, 666.

Similarly, federal courts, faced with this issue, have consistently taken the same position. See e.g. Kennedy v. Cardwell, 487 F. 2d 101, 107 (6th Cir., 1973); United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973); United States v. Roustio, 455 F. 2d 366, 371 (7th Cir. 1972); United States v. Samuel, 431 F. 2d 610, 614-16 (4th Cir. 1970); Woodards v. Cardwell, 430 F. 2d 978, 982 (6th Cir. 1970); Loux v. United States, 389 F. 2d 911, 919-20 (9th Cir. 1968); Gregory v. United States, 365 F. 2d 203, 205 (8th Cir. 1966); Way v. United States, 285 F. 2d 253, 254 (10th Cir. 1960). Thus, any variations in decisions are not because of a conflict in the law but merely in an application of the law to the facts of the particular case. Since the ruling in this case was after a careful review of the situation, it does not present a substantial federal question suitable for review on certiorari. United States v. Johnston, 268 U.S. 220, 227 (1925).

Furthermore, that ruling was correct and was not an abuse of discretion. Petitioner and his codefendant were convicted felons charged with a cold blooded, violent crime. Even before the killing they were designated as high security risks to be isolated from the remainder of the inmate population. (RT 131-32, 1460.) See also Sun Co. of San Bernardino v. Superior Court,

29 Cal. App. 3d 815, 819, n. 3. Furthermore, petitioner's codefendant had been convicted of escape twice, once with force. (RT 1370.) Since the trial judge admonished the jury to disregard the security precautions taken (RT 326-27), and since he attempted to prevent the jury from learning that petitioner was wearing leg irons, it can only be concluded the trial judge did not abuse his discretion.

II

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN A CHALLENGE TO THE FAIRNESS OF THE TRIAL BECAUSE OF THE ORDER RE PUBLICITY ON DUE PROCESS GROUNDS

Before and during the opening stages of the trial, the prosecution's motion to prohibit the press from publishing names and photos of prospective prosecution inmate witnesses was considered. This was described by the Court of Appeal in Sun Co. of San Bernardino v. Superior Court, supra, 29 Cal. App. 3d at 817-21. At first, the motion was denied. (RT 12.) Prior to this ruling, petitioner opposed any gag order on the ground he did not want to be a party to anything which would ". . . restrict the press from printing fair, accurate information concerning this case, whatever that information may be." (RT 10.) Later, petitioner pointed out there were no complaints presented from the inmate witnesses about possible publicity of their names and police reports were available to the defense which contained the names of the witnesses. (RT 46-47.) Finally, petitioner argued the People had not presented any factual declarations under penalty of perjury. (RT 106.) Ultimately,

the court issued an order prohibiting the news media from printing for approximately six months the names and photographs of several inmate witnesses who were to be called by the prosecution. (RT 112-17.)

Several newspapers sought appellate relief. On January 4, 1973, the California Court of Appeal for the Fourth Appellate District, Division Two, in Sun Co. of San Bernardino v. Superior Court, supra, 29 Cal. App. 3d 815, held the order was unconstitutional following petitioner's conviction.

Following his conviction, petitioner appealed to the same court and argued in his opening brief the gag order violated his right to a public trial. The People responded to the public trial issue and the Court of Appeal held petitioner was not denied his right to a public trial. See Appendix A to Petition, pp. 6-8.

Petitioner now argues the unconstitutional gag order deprived him of a fair trial and due process of law guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. Pet. 17-19. He apparently abandons his public trial argument. Yet he failed to properly present his fair trial and due process grounds to the California courts and have those courts pass upon the issue. Accordingly, this Court is without jurisdiction to consider this issue. Beck v. Washington, 369 U.S. 541, 549-53 (1962); Food Employees v. Logan Plaza, 391 U.S. 308, 334 (1968) (Harlan, J. dissenting).

Further, petitioner's argument is inconsistent with his position taken at trial. Here, petitioner's position is the Sixth and

Fourteenth Amendments insure ". . . that any potential recipient of such information distributed by the free press media who has contradictory testimony might come forward and disclose such contradictory information." Pet. 17. This absence of publicity, he continues, deprived him of a fair trial and due process of law. Petitioner did not make this argument at trial. There, he argued the gag order would have had no effect.

> "Secondly, I would point out both of the defendants have had copies of all of the police reports made available to the defense for many, many months and had them at a time when they themselves have remained in the institution in Cypress Hall in particular and it would seem to me if anyone was interested in learning these names they would have found out a long time ago who are the principle people." (RT 46-47.)

Obviously, petitioner can not have it both ways.

In any event, the impact this gag order had on petitioner's trial was simply inconsequential and purely speculative. The order was carefully limited to prohibit the publication only of prosecution inmate witnesses' names and photographs. In all other respects, the press was unencumbered and as a result, the trial was well publicized. Appendix A, Pet. p. 8. The defense knew who the witnesses were months in advance of trial. (RT 47.) Consequently, petitioner's attorney was permitted to travel and received authorization for expenses to travel to San Luis Obispo, San Quentin, and Folsom to interview inmates in those facilities. (CT 24-25.)

Consequently, the very minute impact the order re publicity could have had upon this trial -- this was recognized by petitioner's codefendant's trial attorney (RT 49) -- lead to the inevitable conclusion petitioner was not denied due process of law.

III

THIS COURT DOES NOT HAVE JURISDICTION TO DETERMINE IF PETITIONER'S RIGHT TO FREEDOM OF ASSOCIATION WAS INFRINGED

The prosecution at trial sought to establish a motive for the killing of Castillo. Paul Dobreaff described the Aryan Brotherhood, the American Nazi Party, and other prison organizations and testified that to his knowledge, the Aryan Brotherhood had a contract out on Castillo's life. (RT 740.) Petitioner admitted he was a member of the Aryan Brotherhood. (RT 1491.) That organization, according to Dobreaff, frequently worked in conjunction with other violence-prone organizations. Thus, Louis Pettijohn's testimony of the prior attempt by other members of the Aryan Brotherhood to kill Castillo (RT 588-93, 1315), in light of the background of the organization, tended to show Castillo was in great danger from members of the Aryan Brotherhood. From the prosecution's point of view, this would explain petitioner's participation in the killing and thereby provide a motive for the killing.

Petitioner contends his First Amendment right to freedom of association, his Sixth Amendment right to a fair trial, and his

Fourteenth Amendment right to due process of law and equal protection of the laws were *infringed by this evidence. Pet. 19-22.* Petitioner did not take this position at trial or before the Court of Appeal. It was petitioner's argument in the state courts that since he did not participate in the previous attempt on Castillo's life and had no knowledge of it, the evidence was not relevant and was prejudicial. (RT 570-72.) The trial judge exercised his discretion and admitted the evidence (RT 575); the Court of Appeal agreed (Appendix A to Pet., pp. 15-16). It follows that this Court is without jurisdiction to entertain petitioner's constitutional argument. Beck v. Washington, supra; Food Employees v. Logan Plaza, supra.

Contrary to petitioner's characterization, the issue herein presented is not at all one of constitutional proportion; it is one requiring review of a trial judge's exercise of discretion on an evidentiary matter. More particularly, the question is whether the evidence was relevant on the issue of motive. At this stage, the question is whether the trial court abused its discretion. Scales v. United States, 367 U.S. 203, 256 (1961); United States v. Catalano, 491 F. 2d 268, 273-74 (2nd Cir. 1974); United States v. French, 470 F. 2d 1234, 1239 (D.C. Cir. 1973). And since the trial court carefully reviewed the proffered evidence before ruling (RT 570-75), no federal question suitable for review on certiorari is presented. United States v. Johnston, supra.

Relevant evidence, of course, is admissible. Cal. Evid. Code §351. Evidence is relevant when it logically and by reasonable inference tends to establish any fact.

Generally, judges are given wide latitude in determining the relevancy of proffered evidence. United States v. Catalano, supra, United States v. Marlin, 471 F. 2d 764, 766 (7th Cir. 1972); United States v. Craft, 407 F. 2d 1065, 1069 (6th Cir. 1969). Evidence of motive to kill is certainly relevant and its admissibility is within the trial court's discretion. Barbeau v. United States, 193 F. 2d 945, 950 (9th Cir. 1951); United States v. Bomwell, 467 F. 2d 895, 896-97 (3rd Cir. 1972); United States v. Kwitek, 467 F. 2d 1222, 1225 (7th Cir. 1972).

From the evidence of the prior attack on Castillo by other members of the Aryan Brotherhood, from petitioner's membership in the Aryan Brotherhood, and Dobreaff's testimony of a contract on the life of Castillo, the prosecution asked the jury to infer that petitioner would be expected to participate in the killing because he was a member of an organization engaged in violence and that organization wanted Castillo dead. The jury, as trier of fact, was not obligated to accept this theory (CT 121, 132) although it was bound to consider the evidence only as it related to motive or credibility (CT 151). On appeal, the California Court of Appeal was bound to adopt this theory if it were reasonable. People v. Redmond, 71 Cal. 2d 745, 755. It did, but petitioner now objects. Pet. 21. Yet the inference, by providing a motive for an otherwise senseless killing, is a reasonable and proper one and is certainly not the type of evidence which infringes upon one's right to freedom of association or one's right to a fair trial. United States v. Rosenberg, 195 F. 2d 583, 595-96 (2nd Cir. 1952); see also Scales v. United States, supra, 367 U.S. at 256-57.

IV

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN PETITIONER'S CONTENTION HE WAS DEPRIVED OF DUE PROCESS WHEN HE WAS NOT PERMITTED TO PERSONALLY EXAMINE CONFIDENTIAL PRISON FILES

Petitioner sought discovery of evidence in two broad areas before and during trial. One was a motion for discovery of the inmate files of the prosecution protective custody witnesses. This motion was apparently denied prior to trial and renewed during trial. The court denied the motion on the ground the evidence sought lacked relevancy. (RT 895-86.) Leaving aside the issue of relevancy (for a discussion of this aspect of the issue, see RT 93-96), the fact remains the information sought from the prosecution inmate witnesses' central files maintained by the California Department of Corrections was confidential and should not have been disclosed. Procunier v. Superior Court, (Losoya) 35 Cal. App. 3d 207. Petitioner apparently has abandoned this argument.

The second request for discovery also involved disclosure of confidential information which could have been prevented had the District Attorney asserted that privilege. This motion for discovery involved information concerning any assaultive incidents to which Castillo may have been involved either as an aggressor or as the victim. (RT 1106-07.) A discussion followed the motion for discovery wherein it was recognized that the state had a legitimate interest in keeping some information from a file confidential (RT 1108-10); a claim of confidentiality would then require an in camera

hearing before the trial judge. See generally People v. Superior Court (Biggs), 19 Cal. App. 3d 522. However, the District Attorney pointed out that the file could be quite lengthy and might require a great deal of time to review. The court then directed that Mr. Coffman, a representative from the California Department of Corrections

> ". . . should go into that file and select those matters out and that he himself then at some point perhaps next week during a recess is going to be placed under oath and we are going to ask him under oath if he has selected those matters and that way he might find them for me." (RT 1111.)

No objection to this procedure was made by petitioner; in fact, he expressed confidence everything would be worked out. (RT 1113.)

Apparently everything was worked out. Shortly thereafter, the District Attorney reported that he had inspected Castillo's file and delivered to defense counsel all relevant reports. The District Attorney was prepared to have Mr. Coffman testify under oath. However, the defense accepted the District Attorney's representation and again no objection to what had transpired was made. (RT 1165.)

Petitioner now argues the solution fashioned by the trial judge was unfair. His position is the District Attorney could not adequately view the file from the defense point of view and such a procedure is inconsistent with the adversary process. He also argues he was denied his right of confrontation and cross-examination.

Pet. 22-25. As shown, no objection to the solution reached by the trial court was made at trial; since none was made, the Court of Appeal quite appropriately concluded petitioner was satisfied with this solution and therefore did not determine whether the solution was a proper one. Appendix A to Pet. p. 14. Thus, the issue has not properly been preserved and this Court is without jurisdiction to entertain it. Beck v. Washington, supra, 369 U.S. 541, 549-53; Food Employees v. Logan Plaza, supra, 391 U.S. 308, 334.

The trial court's solution was manifestly fair. The interests of California in maintaining its inmate files confidential is clearly justified. See Procunier v. Superior Court (Losoya), supra, 35 Cal. App. 3d at 209, n. 1. The District Attorney was well aware of this. (RT 1108.) On the other hand, the defense presented reasons why the file might contain information necessary for the defense and therefore should be disclosed. To solve this difficult problem and balance the competing interest, the trial court ordered a California Department of Corrections representative to examine the file for possible relevant information and report back, under oath. (RT 1111.) In light of the fact petitioner did not express dissatisfaction with this procedure, it cannot be concluded due process requires any more. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

CONCLUSION

For the foregoing reasons, we respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted

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